(5)

No. 90-970

In the Supreme Court of the United States

OCTOBER TERM, 1990

LECHMERE, INC.,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Petitioner, Lechmere, Inc. ("Lechmere"), respectfully submits this reply to the brief filed on behalf of the respondent National Labor Relations Board ("NLRB" or "Board") by its General Counsel in opposition to Lechmere's petition for writ of certiorari.

I. Denial of the Petition for Writ of Certiorari will Legitimize the Board's Disregard of the *Babcock & Wilcox* Burden of Proof.

The General Counsel unquestionably had the burden of showing that without trespassing on Lechmere's property, the Union had no reasonable alternative means of communicating with its intended audience. *Jean Country*, 291 N.L.R.B. No. 4, slip op. at 7 (1988) (citing *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 113-114 (1956)). The General Counsel's opposition to Lechmere's petition demonstrates that the Board has almost eliminated and in part even shifted this burden of proof in the wake of *Jean Country*. Lechmere respectfully suggests that this is a further reason for this Honorable Court to review the *Jean Country* formula and its application in this case.

First, the opposition demonstrates the Board's endorsement of speculation and unsupported opinion as substitutes for facts in proving whether the Union's message reached Lechmere's employees. On the relative effectiveness of the Union's newspaper advertisements, the General Counsel cites to the Board's "findings" that many employees "*may* never receive, purchase, or read these local newspapers, or *may* be exposed to them only occasionally." Opp. at 11; *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 5 (1989) (emphasis supplied) (Pet. at B-5). The General Counsel's opposition goes further, stating that "*there was no showing*" that Lechmere's employees received, purchased, or read the newspaper. Opp. at 11.

On the relative effectiveness of tracing license plate numbers to identify employees, the General Counsel cited the Board's "findings" that "employees *may* use cars registered to others, *may* car-pool, *may* walk or take the bus to work, or *may* not park in the designated employee area." Opp. at 11; *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 5-6 (emphasis supplied) (Pet. at B-5).

On the relative effectiveness of handbilling and displaying

signs on the public property near the Lechmere store, the General Counsel cited the Board's "finding" that this was an "ineffective and unsafe locale for union activity." Opp. at 11; *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 6 (Pet. at B-6). This "finding" was supported by conclusions about the speed of traffic passing by the Lechmere store, the lack of a stop sign or traffic light, the flow of customers during business hours, and a policeman's caution that the union representatives should be careful near the street. *Id.*[1]

These "findings" that the General Counsel met his burden of proof are nothing more than the Board's endorsement of the General Counsel's subjective opinion that these communication methods are ineffective. The Board has broad investigatory powers.[2] To meet its burden of showing that no reasonable alternatives to trespass enabled the Union to reach Lechmere's employees, the General Counsel could have *asked* employees directly whether the Union's various forms of communication reached them. The Board's approach since *Jean Country* substitutes patronizing speculation and opinion for the actual experiences of employees, virtually eliminating the *Babcock & Wilcox* burden of proof.

In addition, the opposition demonstrates that the Board is inclined even to shift the *Babcock & Wilcox* burden of proof. General Counsel directly suggests that Lechmere failed to "show" that the Union's alternative methods of communication

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[1] The Board itself also mischaracterized the public property as a "10-foot-wide strip"; the public strip is actually over 40 feet wide. Pet. at A-3; Opp. at 2.

[2] The NLRB Casehandling manual describes the investigation of an unfair labor practice charge as follows:

> It is the responsibility of the Board agent to take steps necessary to ascertain the truth of the allegations of a charge. The Board agent should exhaust all lines of pertinent inquiry, whether or not they are within the control of, or are suggested by, the charging party.... [T]he Board agent should take all investigative steps, short of "fishing," in areas reasonably calculated to bring results.

NLRB Casehandling Manual §10056.4.

actually reached the workforce. Opp. at 11 ("there was no showing that [employees] received, purchased, or read this newspaper"). The First Circuit displayed the same incorrect inclination. *Lechmere, Inc.* v. *NLRB*, 914 F.2d 313, 316 (1st Cir. 1990) (Pet. at A-5) ("there is no particular reason to believe that many of the affected employees actually saw the ads"). Lechmere has no such burden. Instead, it is the General Counsel who must prove that the Union could not reach Lechmere's employees.

This extremely loose approach to an important burden of proof is but another reason to grant Lechmere's petition for writ of certiorari. After *Jean Country* the Board can authorize infringement of private property rights even when a union has in fact reached employees through the available alternatives to trespass.

II. The General Counsel has Stretched the Record and the Case Law to Support his Position.

This Reply Brief was also motivated by certain unwarranted conclusions in the General Counsel's opposition.

The General Counsel freely referred to Lechmere allegedly censoring the store's newspapers to prevent employees from seeing the Union's advertisements. Opp. at 2, 11 n.4. The First Circuit made similar references. *Lechmere, Inc.* v. *NLRB*, 914 F.2d at 316 (Pet. at A-5). The Board itself was far less emphatic about this point. *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 5 (Pet. at B-5 n.9). The inference drawn by the General Counsel (and the First Circuit) was that Lechmere's alleged censorship further undercut the efficacy of the Union's newspaper advertisements. Opp. at 11 n.4.

The actual evidence before the Administrative Law Judge was limited to this: the store manager testified that he removed both the union's and competitor stores' ads from those editions of the Hartford Courant delivered to the store. There was no evidence that this took place before employees saw the newspapers, nor was there evidence of what happened to the ads after they were separated from the rest of the paper. This is a further example of the laxity in the Board's approach to the General Counsel's burden of proof.

The General Counsel also quarrels with Lechmere's point that since *Jean Country*, nearly all accommodation analyses that the Board has performed have resulted in granting union agents access to an employer's property. Opp. at 12 n.5. By citing only two cases in which the Board has denied access (as opposed the thirteen cases cited by Lechmere where access was granted, Pet. at 12-13 n.3) the General Counsel only highlights the reality that *Jean Country* as applied is untrue to the principles of *Babcock & Wilcox*.

Lechmere respectfully requests that its petition for writ of certiorari be granted.

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